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Advantages to International Satellite Organizations

This section of the report responds to the reporting requirements in section 6(7) of the IAFCA, which requests information on advantages, in terms of immunities, market access or otherwise, enjoyed by the international satellite organizations (ISOs), the International Telecommunications Satellite Organization (INTELSAT), and the International Mobile Satellite Organization (Inmarsat); the reason for such advantages; and an assessment of progress toward fulfilling the policy described in that section. A more thorough and historical perspective of the ISOs and the advantages that they have enjoyed is provided in the July 1999 report to Congress. Chapter 10 in the 2000 report is intended to update the findings of last year's report.

INTELSAT is a treaty-based global communications satellite cooperative with 143 member countries. INTELSAT was created to enhance global communications and to spread the risks of creating a global satellite system across telephone operating companies from many countries. Inmarsat was created to improve the global maritime communications satellite system that would provide distress, safety, and communications services to seafaring nations in a cooperative, cost-sharing entity. Comsat Corporation (Comsat) is the U.S. signatory to INTELSAT and formerly to Inmarsat and participates in the commercial operations of the ISOs.

To prepare this report, the National Telecommunications and Information Administration (NTIA) within the Department of Commerce issued a Request for Comments (RFC) in the April 18, 2000, *Federal Register*.[1] NTIA sought views of all interested parties through this notice. The comments received are posted on NTIA's website.[2] With the cooperation of the State Department, requests were also sent to U.S. embassies seeking information on "favorable treatment" to INTELSAT and/or Inmarsat. Comments filed in Federal Communications Commission (FCC) proceedings in matters pertaining to INTELSAT, Inmarsat, and Comsat were also useful in preparing this section of the report.

Since the first report to Congress in July 1999, there have been both legislative and policy advancements towards privatizing ISOs. On March 17, 2000, the President signed into law the Open-Market Reorganization for the Betterment of International Telecommunications (ORBIT) Act.[3] The purpose of the ORBIT Act is to "promote a fully competitive global market for satellite communications services for the benefit of consumers and providers of satellite services and equipment by fully privatizing [INTELSAT]." The ORBIT Act contains a number of criteria for the timely pro-competitive privatization of INTELSAT and Inmarsat.[4]

It is expected that as steps toward privatization proceed, the advantages enjoyed by ISOs, in terms of immunities, market access, or otherwise, will fade. It should be noted that the ORBIT Act requires the President and

the Commission to make annual reports to the Committees of Commerce and International Relations of the House of Representatives and the Committees on Commerce, Science, and Transportation and Foreign Relations of the Senate regarding the privatization of INTELSAT and Inmarsat.[5]

Since the first report to Congress, INTELSAT's Assembly of Parties, which determines overall policy for the organization, has taken steps to bring about pro-competitive privatization. In October 1999, the Assembly of Parties decided to privatize INTELSAT at the earliest possible date and agreed that privatization could take place as soon as April 2001.[6] Moreover, INTELSAT's Board of Governors established a transition plan to achieve the goal of privatization.[7]

As with the July 1999 report, this report will focus primarily on INTELSAT because Inmarsat has made substantial progress in the area of privatization, namely the April 15, 1999, transfer of all the business and assets of its ISO precursor to Inmarsat Ltd., a wholly owned subsidiary of Inmarsat Holdings Ltd. Inmarsat Ltd. was created for the purpose of receiving those assets. Both Inmarsat Ltd. and Inmarsat Holdings Ltd. are private companies incorporated in the United Kingdom and subject to English law.[8] Neither Inmarsat Ltd. nor Inmarsat Holdings Ltd. retains any privileges or immunities in any country, and both are subject to all standard competition laws, tax codes, and regulatory regimes.[9] Inmarsat Holdings Ltd. states that it is planning an initial public offering for the second quarter of 2001.[10] We note that in its Master Transition Agreement, Inmarsat committed to retain an investment banker within 180 days of privatization for the purposes of preparing an initial public offering of stock. Although Comsat states that the selection for an investment bank will occur in May 2000, we are not aware of Inmarsat Ltd. having done so thus far.[11]

In the privatization process, a small residual intergovernmental organization was maintained as a separate legal entity, responsible for ensuring that Inmarsat fulfills its public safety obligations with respect to the Global Maritime Distress and Safety System.[12] The Inmarsat ISO holds a "special share" in Inmarsat Holdings Ltd.

Privileges and Immunities

As stated in the July 1999 report, INTELSAT and its signatories, when acting in the INTELSAT context, benefit from privileges and immunities that have provided some commercial advantages. In the July 1999 report, a historical perspective of the necessity for privileges and immunities for ISOs was provided. Briefly, when INTELSAT was created, there was no experience with international satellite communications. Because of the commercial risk associated with an international satellite organization, and because of the public service obligations to be undertaken by INTELSAT,[13] privileges and immunities were provided to give INTELSAT protection and to increase its chances of success.

With respect to Comsat, the U.S. signatory to INTELSAT, the ORBIT Act outlines the parameters of its privileges and immunities, and specifically provides that "Comsat shall not be entitled to any privileges or immunities under the laws of the United States or any State on the basis of its status as a signatory of INTELSAT or Inmarsat."[14] The ORBIT Act, however, limits Comsat's liability when it is carrying out the instructions of the United States government and limits liability to Comsat's percentage of ownership of INTELSAT.[15]

In comments submitted in response to the RFC, INTELSAT states that its governing bodies have determined that the privatized INTELSAT will not have any of the privileges and immunities currently enjoyed by INTELSAT.[16] Specifically, in October 1999, INTELSAT's Assembly of Parties decided that a holding company structure would offer the most suitable arrangement for the new INTELSAT and that neither the holding company nor its subsidiaries would have any privileges or immunities.[17] Moreover, on November 30, 1998, INTELSAT transferred five of its satellites to New Skies Satellites N.V., a separate, independent Netherlands-based private company.[18] New Skies competes against INTELSAT and other satellite providers in the United States and abroad and enjoys no privileges or immunities.[19]

In its comments filed in response to the RFC, PanAmSat argued that despite INTELSAT's recent decisions about privatization, the reality is that nothing about its structure has changed and that it "still remains under the control of foreign governments and retains all of its privileges and immunities." PanAmSat describes an array of legal immunities that INTELSAT enjoys, such as:

> immunity from suit, including private or public prosecution on antitrust charges as well as tort or contract claims; immunity from taxation, including exemption from both import duties and taxes and communications and property taxes and national taxes such as China's seven percent withholding tax on the lease of space segment capacity sold to Chinese entities by foreign satellite service providers; archival and testimonial immunity, which protects Intelsat from being

> compelled to provide documents or the testimony of its employees; and immunity of assets, which prevents courts from enforcing monetary judgments against [INTELSAT].[20]

INTELSAT and, in some cases, its signatories continue to enjoy those privileges and immunities as a result of INTELSAT's status as an ISO. Moreover, because many of the signatories to INTELSAT are government-owned or are a part of the government, they enjoy privileges and immunities that private companies do not enjoy. INTELSAT's privileges and immunities will continue to exist until it is privatized.

Market Access

Market access continues to be the main concern in international telecommunications, including satellite telecommunications. U.S. firms such as PanAmSat and GE American continue to voice concerns regarding barriers to providing satellite services in foreign markets. As privatization becomes more global and as competition replaces monopoly service providers, the market access barriers will gradually come down. Many large member nations of the World Trade Organization (WTO) have removed or have committed to remove monopolies and other market access barriers.

As stated in the July 1999 report, in some cases, market access barriers may be the result of foreign monopoly telecommunications providers or government regulatory authorities that operate as signatories to INTELSAT. Often, monopoly providers have a majority or significant government ownership, and thus the particular foreign laws are more favorable to those providers. Market access restrictions can range from prohibition on the provision of certain services to restrictions that make it expensive for competitive carriers to offer certain services in foreign markets. As noted by PanAmSat, these market barriers have a spillover effect because switched voice and private line customers will not choose a satellite provider that does not have access to all of the countries that a customer requires.[21] We reiterate that INTELSAT, as a wholesale provider of satellite services, is not itself the cause of market access barriers. In other words, if INTELSAT did not exist, the foreign signatories could simply use another source of wholesale satellite capacity and continue to deny or limit market access to U.S. and other competitive providers of satellite services, though the incentive to do so would be much lower.

A number of U.S. embassies reported certain restrictions placed overseas on foreign firms that have the effect of limiting or restricting market access. For example, some countries require foreign firms to install earth stations as a condition for providing satellite services. Other countries require competitors to access INTELSAT through the signatory or require foreign service providers to enter into joint ventures or cooperative agreements as a prerequisite for providing service. Although a number of embassies reported market access restrictions, they did note that these restrictions were the result of exclusive contracts with monopoly providers. While the contracts will end in the next few years, they may or may not be renewed.

PanAmSat contends that INTELSAT is free from the market access restrictions that PanAmSat and other competitors experience. Such restrictions include

> satellite authorizations, space segment provider licenses, and unreasonable access charges; switched voice and private line market access restrictions including exclusive dealing, denial of operating authority and landing rights, earth station restrictions, interconnection denials and restrictions; full-time and occasional-use market access restrictions; and Internet bottleneck.[22]

In its comments, INTELSAT does not address market *access*, but instead submits that it does not have market *power* in global communications services.[23] INTELSAT submits that it owns less than 10 percent of the nearly 200 geostationary communication satellites that orbit the earth and that in addition to other satellite companies, it competes with fiber optic submarine cable companies as well.[24] In support of its position, INTELSAT referenced the Commission's 1998 COMSAT Non-dominance Order that concluded that INTELSAT "does not exercise market power in the provision of full-time video service market … [and therefore is] a non-dominant carrier in the provision of full-time video services in all geographic markets."[25] INTELSAT further noted its decline in the share of combined switched voice and private line service markets which is expected to decline further to 10 percent by 2005.[26]

Lockheed Martin notes that the majority of INTELSAT shares are owned by signatories from WTO member countries that support pro-competitive privatization of the ISOs. Thus, Lockheed Martin argues that given the broad influence of WTO member nations within INTELSAT, it is not a question of whether market access impediments will diminish, but how quickly it will occur.[27]

Both GE American and PanAmSat blame market access problems on INTELSAT signatories that control access to their countries' markets.[28] Both companies also submit that the situation is likely to change as domestic privatization reduce the extent to which signatories are

government owned, i.e., when INTELSAT assets are separated from entities that control market access.[29]

We note that in 1999, the Commission permitted U.S. users and service providers to obtain Level 3 direct access to INTELSAT space segment capacity.[30] The Commission stated that "[l]evel 3 direct access permits customers to enter into a contractual agreement with INTELSAT for ordering, receiving, and paying for INTELSAT space segment capacity at the same rates that INTELSAT charges its signatories."[31] We note further, however, that Level 3 direct access matters only to the extent that INTELSAT space segments are available. To the extent that Comsat has contracted for the majority of available INTELSAT space segments, then it has essentially blocked direct access.

The ORBIT Act attempts to address the market access problem through its prohibition on exclusivity arrangements. Specifically, the Orbit Act states that "[n]o satellite operator shall acquire or enjoy the exclusive right of handling telecommunications to or from the United States … and any other country or territory by reason of any concession, contract, understanding, or working arrangement to which the satellite operator … [is a party]."[32] This provision appears to cover all satellite operators and customers, as well as ISOs.

Preferential Tax or Regulatory Treatment

There are two proceedings at the Commission that focus on whether INTELSAT and Comsat will receive preferential or more favorable regulatory treatment. On April 3, 2000, the Commission released a Notice of Proposed Rulemaking (NPRM), which commenced a proceeding to revise its schedule of Regulatory Fees to collect regulatory fees that Congress required it to collect pursuant to Section 9(a) of the Communications Act, as amended.[33] In the NPRM, the Commission proposes to "assess regulatory fees for all space stations in geostationary orbit, including satellites that are the subject of Comsat's activities, in the amount of $94,650 per satellite."[34] The Commission's proposal was based on two recent events. The first was a provision in the ORBIT Act which provides:

> [c] Parity of Treatment—Notwithstanding any other law or executive agreement, the Commission shall have the authority to impose similar regulatory fees on the United States signatory which it imposes on other entities providing similar services.[35]

The other rationale for the Commission's proposal is the recent decision by the U.S. Circuit Court for the District of Columbia in *PanAmSat Corp. v. FCC.*[36] In that case, the court ruled that Comsat is not exempt from paying Section 9 regulatory fees. Comsat has strongly objected to the imposition of this regulatory fee and has challenged the legality of the Commission to impose it. In its comments to the Commission, Comsat argues that Section 9 space station fees may only be assessed to recover costs expended in regulating stations as "radio facilities" pursuant to 47 CFR Part 25, and that INTELSAT satellites are not licensed by nor regulated by the Commission pursuant to 47 CFR Part 25.[37] Thus, according to Comsat, the Commission bears no costs in regulating INTELSAT space stations as "radio facilities." Both GE American and PanAmSat argue that it is equitably proper for the Commission to impose Section 9 regulatory fees on Comsat because the past exemption has forced competitors to pay costs attributable to the regulation of Comsat.[38] The Commission's comment period in the proceeding regarding Section 9 regulatory fees closed on May 5, 2000. The Commission has not rendered a decision regarding whether Comsat will be exempt from paying Section 9 regulatory fees.

With respect to INTELSAT, GE American opposes Intelsat LLC's application[39] for the licensing of seventeen operational C- and Ku-band satellites because it requests waivers of certain FCC regulations that are imposed on other satellite providers.[40] Specifically, GE American argues that the application requests exemption from two-degree spacing rules, open-ended waivers of FCC technical standards, and other FCC requirements.[41] GE American requests that the FCC enforce its regulations on Intelsat LLC in the same manner as it does against all other satellite providers.[42]

National Contracts—Preference for ISOs

It can be assumed that state-owned monopoly providers have an advantage with respect to government contracts. The data available, however, do not indicate an overwhelming preference given to ISOs or signatories with respect to national contracts. A few U.S. embassies reported that the signatories or monopoly provider of services were given preference with respect to government contracts. In each case, the government held 100 percent or majority ownership in the monopoly.[43]

There is no evidence that the U.S. government has given ISOs undue preference in the award of government contracts.

Access to Spectrum and Orbital Slots

As stated in the July 1999 report to Congress, advantaged access to spectrum and orbital slots has been historically easier for ISOs because of the fact that they were the original market entrants and thus, had first choice to available resources. PanAmSat argues that INTELSAT is still using its governmental position to expand its satellites and orbital slots to create a vast amount of satellite capacity that will "overhang" the commercial market in the future after Intelsat is privatized.[44]

GE American likewise argues that INTELSAT's requests for new or modified satellite systems are forwarded to the International Telecommunications Union (ITU) without FCC or any regulatory review, and as a result, INTELSAT has been able to register and warehouse a number of orbital locations without bringing them into use.[45] For example, GE American states that Intelsat LLC, in its application for FCC licensing of seventeen operational C- and Ku-band satellites, has requested authority to use five new orbital positions that INTELSAT registered at the ITU.[46] GE American argues that this effort by INTELSAT to pass its competitive advantage to Intelsat LLC impedes competition in the U.S. because INTELSAT retains control over Intelsat LLC without a comprehensive plan for independence. This is an important fairness issue that should be resolved in a pro-competitive manner.

Conclusion

This chapter has briefly reviewed the status of the advantages of ISOs. Advantages continue to diminish as the forces of privatization and globalization increase. We note again, as we did in the July 1999 report, that these advantages are diminishing as a result of the combined effects of ISO privatization, global and national trends in telecommunications liberalization and privatization, the WTO/Group on Basic Telecom Agreement, and ongoing attention of U.S. industry and government. The ORBIT Act recently enacted by Congress provides another vehicle to monitor the extent to which privatization reduces the advantages traditionally accorded ISOs. We expect that we will continue to see progress in this area and that satellite service providers will enjoy an increasingly level playing field.

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[1] *Market for Satellite Communications and the Role of Intergovernmental Satellite Organizations*, Notice and Request for Comments, Docket No. 000410098-0098-01, 65 Fed. Reg. 20804 (2000) (April 18, 2000). The RFC is available on NTIA's website.

[2] Comments may be viewed on NTIA's website at http://www.ntia.gov/ntiahome/occ/oecd2000/commentsindex.htm.

[3] Pub. L. No. 106-180, 114 Stat. 48 (2000)("ORBIT Act").

[4] Privatization, as used herein, means that the entity no longer exists as an international governmental organization. It does not necessarily mean that the entity is wholly owned by private parties.

[5] ORBIT Act at Section 646.

[6] INTELSAT comments at 9 (available at http://www.ntia.doc.gov/ntiahome/occ/oecd2000/intelsat/intelsat.htm).

[7] INTELSAT comments at 9; *see* INTELSAT press release (February 28, 2000) (available at http://www.intelsat.com/news/press/2000-08e.htm) (INTELSAT announces that it has retained a financial advisor to advise it on capital markets, business and structural matters related to privatization).

[8] Inmarsat comments at 4 (available at http://www.ntia.doc.gov/ntiahome/occ/oecd2000/inmarsat/inmarsat.htm).

[9] Inmarsat comments at 4; Comsat comments at 2–3 (available at http://www.ntia.doc.gov/ntiahome/occ/oecd2000/comsat/comsat.htm).

[10] Inmarsat comments at 9.

[11] Comsat comments at 6.

[12] GMDSS is "the automated ship-to-shore distress alerting system which uses satellite and advanced terrestrial systems for international distress communications and promoting maritime safety in general. The GMDSS permits the worldwide alerting of vessels, coordinated search and rescue operations, and dissemination of maritime safety information." ORBIT Act at Section 681(20).

[13] INTELSAT is obligated to provide universal connectivity to all parts of the world and to pay particular attention to less developed countries. (*See* Agreement Relating to the International Satellite Organization, Aug. 20, 1971, 23 U.S.T. 3813; *see also* 47 U.S.C. 701). A number of U.S. embassies responding to the RFC expressed concern about whether privatization of INTELSAT would diminish or eliminate INTELSAT's role in safeguarding and ensuring universal and emergency services for the least developed countries.

[14] ORBIT Act at Section 642(b)(1).

[15] *Id.* at Section 642(b)(2)–(3).

[16] INTELSAT comments at 10; *see also* Lockheed Martin comments at 5 ("INTELSAT has specifically agreed to the termination of its remaining privileges and immunities as part of its transition to private operation") (available at http://www.ntia.doc.gov/ntiahome/occ/oecd2000/lm/lm.htm).

[17] Comsat comments at 10.

[18] INTELSAT comments at 8.

[19] *See New Skies Satellites, N.V. For Authorization to Access the U.S. Market*. 14 FCC Rcd 13003 (1999) (authorizing New Skies a license for the United States but limiting that license to three years).

[20] PanAmSat comments at 4–5 (available at http://www.ntia.doc.gov/ntiahome/occ/oecd2000/panamsat/panamsat508.htm).

[21] *See* PanAmSat comments at 5.

[22] PanAmSat comments at 5.

[23] INTELSAT comments at 3.

[24] *Id.*

[25] *COMSAT Corp. Forbearance from Dominant Carrier Regulation and Reclassification as a Non-Dominant Carrier,* 13 F.C.C. Rcd 14083, 14135 (Report and Order).

[26] INTELSAT comments at 6.

[27] Lockheed Martin comments at 11–12.

[28] GE American comments at 4 (available at http://www.ntia.doc.gov/ntiahome/occ/oecd2000/gea/geacomments.htm); PanAmSat comments at 3.

[29] GE American comments at 4; PanAmSat comments at 3.

[30] *Direct Access to the INTELSAT System*, Report and Order, 14 FCC Rcd 15703 (1999); *see also* ORBIT Act at Section 641(a)(ORBIT Act also permits Level 3 direct access).

[31] *Direct Access to the INTELSAT System*, Report and Order, 14 FCC Rcd at para. 3.

[32] ORBIT Act at Section 648.

[33] *See Notice of Proposed Rulemaking, In re Assessment and Collection of Regulatory Fees for Fiscal Year 2000*, FCC 00-117, MD Docket No. 0058, at para. 1 (rel. April 3, 2000) (NPRM); *see* 47 U.S.C. sec. 159 (a) (Commission authorized to assess these fees to recover the costs it incurs in carrying out enforcement, policy and rulemaking, international, and user information activities).

[34] NPRM at para. 17.

[35] ORBIT Act at Section 642(c).

[36]198 F.3d 890 (D.C. Cir. 1999).

[37]*See* Comsat's comments to NPRM at 7–8; Comsat's Reply comments to NPRM at 2–3.

[38] *See* GE American comments to NPRM at 2; PanAmSat's Reply comments to NPRM at 2.

[39]Intelsat LLC was "established for the purpose of acquiring certain assets of INTELSAT upon privatization and for commencing the process or applying for the requisite licenses/authorizations to operate INTELSAT's global satellite system." INTELSAT comments at 9.

[40]*See* GE American Petition to Deny or Defer Application of Intelsat LLC for Authority to Operate and to Further Construct, Launch and Operate C-Band and Ku-Band Satellites that Form a Global Communications System in Geostationary Orbit (March 6, 2000).

[41]*Id.*

[42]*Id.*

[43] U.S. embassies in Sri Lanka, Oman, Chad, and Poland reported that the monopoly provider of services received preferences with respect to government contracts.

[44]PanAmSat comments at 7.

[45]GE American comments at 2.

[46]Application of Intelsat LLC for Authority to Operate and to Further Construct, Launch and Operate C-Band and Ku-Band Satellites that Form a Global Communications System in Geostationary Orbit, File Nos. SAT-A/O-20000119-0002/18 *et seq*. at Vol. 1 (filed Jan. 18, 2000).